United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1189

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1189

UNITED STATES OF AMERICA,

Appellant,

—*against*—

DANIEL MACKLIN,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

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BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal by the United States, pursuant to 18 U.S.C. 3731, from an order of the District Court for the Eastern District of New York, (Mishler, *Ch. J.*), entered on January 29, 1975,[1] which granted the motion of the defendant, Daniel Macklin, to dismiss the indictment on the ground that the term of the grand jury which returned the indictment had been extended improperly (389 F. Supp. 272). See *United States* v. *Fein*, 504 F.2d 1170 (C.A. 2, 1974). The district court, in the same order also granted the motion of the defendant, Daniel Macklin, to withdraw his plea of guilty to two counts of the indictment (Counts Six and Twenty-Four) which had been entered on August 1, 1973, some 18 months prior to his motion to withdraw the plea of guilty.

[1] On March 27, 1975, the district court entered an order denying a timely application for rehearing. The notice of appeal was filed on April 25, 1975.

The district court, in granting the motion to dismiss the indictment, and permitting the defendant to withdraw his previously entered plea of guilty, rejected the argument of the United States that the defect in the institution of the prosecution had been waived by the failure of the defendant to raise the claim prior to trial in timely fashion, as required by the Federal Rules of Criminal Procedure, Rule Rule 12(b)(2) and 12(b)(3), and by his plea of guilty. The district court reasoned that the indictment returned by the improperly extended grand jury was "void abinitio", that the defect went to the jurisdiction of the district court and did not come within the waiver provisions of Rule 12(b)(2) or the well-settled rule that a plea of guilty waives all but not jurisdictional defects. Since the district court's decision to permit the defendant to withdraw his plea of guilty rested on the same legal ruling, and did not involve an exercise of discretion, we are also seeking a writ of mandamus, asking that the district court be directed to withdraw its order permitting the defendant to withdraw his plea of guilty or, in the alternative, that the district court be directed to reconsider its ruling in light of the holding of this Court on the appeal from the dismissal of the indictment.

We are seeking the relief described above for two reasons: First, the statute of limitations on the offenses charged in the indictment has run. While 18 U.S.C. 3288, would permit a new indictment within six months from the date of the dismissal of the first indictment, if the dismissal is based on an "irregularity with respect to the grand jury", the holding of the district court here suggests that the defect here at issue is something more than such an "irregularity", that the indictment is a nullity. As such there is substantial doubt that the provisions of Section 3288 would be applicable here. Indeed, in our petition for rehearing we suggested, relying on language in *Wax* v. *Motley*, 510 F.2d 318 (C.A. 2, 1975), that, if the defect here is nothing more than "an irregularity with respect to the

grand jury" (510 F.2d at 320), it comes within the plain language of Rule 12(b)(2) which provides that claims "based on defects in the institution of the prosecution" are waived unless timely raised. Yet, in response, the district court reaffirmed its holding that the indictment was a nullity.

Second, the plea of guilty here was entered pursuant to a plea bargain for the defendant's cooperation and, accordingly his sentence was delayed. It is now seven years since the commission of the offense and almost two years since the plea of guilty. The case is now stale and, if we are correct in our argument that the defect here at issue was waived, then the order permitting the withdrawal of that plea on erroneous legal ground should be set aside.

Statement of Facts

On May 16, 1973, a grand jury impanelled in the Eastern District of New York returned a twenty-five count indictment charging the defendant Daniel Macklin, Daniel Macklin, Inc. and Adam Equities, Inc., with numerous violations of 18 U.S.C. 1010 arising out of the submission of false statements in applications for federally insured mortgages. On June 1, 1973, all three defendants pleaded not guilty and August 6, 1973, was set as the date for trial (App. 1a).

Subsequently on August 1, 1973, the defendant Daniel Macklin, withdrew his plea of not guilty to Counts Six and Twenty-Four and entered a plea of guilty (App. 2a). Since the plea was entered as part of a bargain for the defendant's cooperation, his sentence was adjourned without date. After a number of further adjournments, sentencing was scheduled for December 20, 1974. The defendant then filed an application to dismiss the indictment and withdraw his previously entered plea of guilty on the ground that the grand jury which returned the indictment had been

improperly extended (App. 19a). The United States opposed the application on the ground that the defect complained of had been waived by the failure to timely assert the claim under Rule 12(b)(2) and by the plea of guilty. The ground upon which the motion to dismiss was based was available to the defendant before he pleaded, or was discoverable by due diligence, and accordingly, it was argued there was no basis for granting relief from the waiver provisions. The district court, however, held that the defect here was of a different nature than that covered by Rule 12(b)(2) or the general rule regarding the effect of a plea of guilty (App. 26a):

> However, the situation is different where, as here, the defect is one which renders the grand jury's actions void *ab initio*. Since the grand jury had no power to indict, the court had no jurisdiction over the defendant. Furthermore, a defect of this nature can be raised at any time in the proceedings; it cannot be waived.[2]

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[2] The district court denied the motion to dismiss as to the corporate defendants. In so doing the district court held (App. 27a):

> The situation is different, however, with respect to the corporate defendants. As to these defendants the indictment is effective as a charging instrument because the corporation could be proceeded against by an information. The corporate defendants, unlike defendant Macklin, are not subject to any term of imprisonment if convicted of the charges against him. Accordingly, the charges against them are not "infamous" within the meaning of the fifth amendment, (see n. 1 *supra*). The indictment, signed by the United States Attorney, indicating his agreement with the grand jury in the institution of a criminal proceeding, is effective as an information. United States v. Wright, 365 F.2d 135, 137 (7th Cir. 1966). Therefore the defect in the grand jury proceeding does not render the indictment invalid against the corporations. Instead, the indictment is proper as an information and the motion to dismiss the indictment is denied.

ARGUMENT

POINT I

The failure of the defendant to move timely to dismiss the indictment constituted a waiver of the defect in the institution of the prosecution.

1. Our position is basically a simple one. We concede, as we must in light of *United States* v. *Fein*, 504 F.2d 1170 (C.A. 2, 1974) that, had the defendant made a timely motion to dismiss this indictment, he was plainly entitled to the relief of the dismissal of the indictment. For there is no dispute that the district court was without legal authority to empower the grand jury, which returned the indictment, to sit beyond its original eighteen month term. We submit, however, that it is equally plain that such a claim is waived under the Federal Rules of Criminal Procedure, Rules 12(b)(2) and 12(b)(3), by the failure of the defendant to timely raise the claim, and (quite independently of these rules) by the plea of guilty entered by the defendant.

Rule 12(b)(2) of the Federal Rules of Crimial Procedure provides:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

The Advisory Committee Notes, which accompanied Rule 12(b)(2) state in pertinent part, that:

> "Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc.

The defendant's claim here does no more than allege that the indictment was handed up by a grand jury which was "illegally * * * organized" and comes clearly within the waiver provisions of Rule 12(b)(2); the defendant has failed to demonstrate any prejudice warranting the exercise of the discretion of the district court to relieve him from its provisions. The claim was available to the defendant before he pled guilty, and could have been discovered through the exercise of due diligence; moreover, his plea of guilty eliminates any possible claim that he was indicted unjustly. See, e.g., *Davis* v. *United States,* 411 U.S. 233, 243-244 (1973).

While it is true that the waiver provisions of Rule 12(b)(2) do not apply where the "indictment or information fails to show jurisdiction in the court or to charge an offense," it seems plain that this language refers to subject matter jurisdiction which cannot, under any circumstances, be waived. Indeed, since Rule 12(b)(2) speaks of the failure of *the indictment* "to show jurisdiction in the court or charge an offense", rather than of a defect in the institution of the prosecution which affects jurisdiction, it would not seem to support any other construction. See, Wright, *Federal Practice & Procedure (Criminal)*, § 193, p. 405; cf. *United States* v. *Sisson,* 399 U.S. 267, 281-282 (1970) so construing similar language in F. R. Crim. P., Rule 34, which involves motions in arrest of judgment.

This consideration aside, there is simply no reason why this type of defect should be deemed to affect the "jurisdiction" of the district court any more than numerous other defects, including those of constitutional dimension, to which the waiver provisions of Rule 12(b)(2) have been applied. Thus, the Supreme Court only recently held that a claim that a grand jury had been selected in a manner which offended the Constitution was waived by the failure to assert it before trial (*Davis* v. *United States, supra*. Similarly in *Gaither* v. *United States,* 413 F.2d 1061 (C.A.D.C. 1969), the Court of Appeals for the District of Columbia Circuit held that a claim that an indictment had not been read to or acted upon by the grand jury, would be deemed waived by the failure to assert it timely under Rule 12(b)(2). There, Judge J. Skelly Wright observed (413 F.2d 1062, n. 32):

> "The invalidity of the indictment procedure would not normally affect indictments in cases which have already gone to trial, except where the particular objection urged here had also been urged by pretrial motion. Procedural challenges to the indictment must be raised by motion before trial. Rule 12(b)(2), Fed. R. Crim. P.; *Jackson* v. *United States,* 123 U.S. App. D.C. 276, 280 n. 3, 359 F.2d 260, 264 n. 3 (1965), *cert. denied,* 385 U.S. 877, 87 S.Ct. 157, 17 L.Ed. 2d 104 (1966)."

Quite plainly, the defect in the instant case hardly approaches in seriousness or magnitude the defect alleged in those cases. Yet in those and other like cases (see, Wright, *Federal Practice & Procedure* (*Criminal*), § 193, pp. 406-408), the defect has not been held to affect the jurisdiction of the district court. The reason for this is obvious. Since a defendant can waive prosecution by indictment altogether, and since such a waiver (not involving the waiver of a right essential to a fair trial) need not be knowing and deliberate (see, *Schneckloth* v. *Bustamonte,* 412 U.S. 218

[1973]), it is plain that a defect in institution of the prosecution which affects the validity of the indictment may be waived by the failure to timely assert the claim. *Davis* v. *United States, supra; Michel* v. *Louisiana*, 350 U.S. 91 (1955). Such a defect simply does not affect the jurisdiction of the district court to try the defendant on the indictment.[3]

Moreover, aside from the plain language of Rule 12(b)(2), there is simply no reason of policy for concluding that defects of the kind alleged here are jurisdictional and cannot be waived either by failure to move in a timely fashion or by a plea of guilty. The right to indictment by a grand jury, while important and significant, does not reflect a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); see also *Peters* v. *Kiff*, 407 U.S. 493, 499 (1972). To the extent that a grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses, but also a means of protecting the citizen against unfounded accusations" (*Ex Parte Bain*, 121 U.S. 1 (1887) quoting a grand jury charge of Mr. Justice Field; *United States* v. *Dionisio*, 410 U.S. 1, 17, n. 15 [1973]) the district court can ordinarily determine from a review of the record whether, despite an alleged defect, an indictment was unfounded. See e.g., *United States* v. *Esteppa*, 471 F.2d 1132 (C.A. 2, 1972).

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[3] While Rule 7, F.R. Crim. P., provides that where the prosecutor chooses to proceed "by information", the defendant must affirmatively agree to the procedure, that affirmative waiver rule cannot apply—if Rule 12(b)(2) means what it says—where the defendant has been charged in an indictment returned by a grand jury impanelled by the district court, and where it is alleged that the validity of the indictment is affected by some defect in the selection or organization of the grand jury.

Here, of course, the defendant was indicted by a grand jury impanelled pursuant to an order of the district court and operating in all respects as a lawfully constituted grand jury. More significantly, the defendant, by his plea of guilty eliminated any concern that he was the victim of an "unfounded indictment" handed up by a grand jury which "by dint of longer service become[s] * * * [an] arm of state instead of representatives of the citizenry". (*United States* v. *Fein*, 504 F.2d at 1179). Indeed, if ever there were a case more ill suited for the creation of an exception to the waiver rule mandated by Rule 12(b)(2), it is this case; and, it is not surprising, as we now show, that there is not only little in the way of reason and authority to support the holding below, but there is even less in the way of precedent.

2. The only authority, relied upon by the district court, was Judge Dooling's opinion in *United States* v. *Fein*, 370 F. Supp. 466 (E.D.N.Y.), *affirmed*, 504 F.2d 1170 (C.A. 2, 1970), which held that the grand jury that handed up the instant indictment had been extended improperly and that it was a defect "that goes to jurisdiction" (App. 25a, quoting from 370 F. Supp. 466).

An examination of that part of Judge Dooling's opinion in the *Fein* case which dealt with issue of waiver—an issue which was not considered by this Court—shows that he relied solely upon the opinion of a single district court judge in *United States* v. *McKay*, 45 F. Supp. 1007 (E.D. Mich., 1942). Thus he observed (370 F. Supp. at 469):

> The present motion is not one which is required by Rule 12(b)(2) and (3) to be raised before the plea is entered, since it is considered an objection that goes to jurisdiction. That point was decided under the earlier statutory form of present Rule 12(b)(2), (3) in the *McKay* case."

We respectfully submit that Judge Dooling relied erroneously upon *United States* v. *McKay*, *supra*, because the "earlier statutory form of present Rule 12(b)(2), (3)" which was at issue in the *McKay* case did not contain the same broad language as Rule 12(b)(2). The earlier statutory form, to which the district court in *United States* v. *McKay*, *supra*, addressed itself provided (18 U.S.C. 556a [1940 ed.]):

> "No plea to abate nor motion to quash any indictment upon the ground of irregularity in *the drawing* or *impanelling* of the grand jury or upon the ground of disqualification of a grand juror shall be sustained or granted unless such plea or motion shall have been filed before or within ten days after the defendant filing such plea or motion is presented for arraignment" (emphasis added).[4]

The only defects to which former Section 556(a) applied were irregularities in the drawing or impanelling of the grand jury, and the language was held by the district court in *McKay* to apply "to the constitution of the grand jury at its inception" or with "irregularities occurring in the grand jury room while it was legally in session" (45 F. Supp. at 1014). The grand jury in *McKay*, while lawfully sitting solely pursuant to an order to complete unfinished business, handed up an indictment which involved a new matter; and the district court held that this defect did not involve any "irregularity in the drawing or impanelling of the grand jury." The *McKay* case did not hold that the defect there alleged "goes to [the] jurisdiction" of the district court to try the indictment; it held only that the defect did not come within the terms of the then applicable waiver statute.

The instant case differs in two material respects. First, Rule 12(b)(2) is not limited solely to defects "in the

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[4] Former Section 556a is set out in 45 F. Supp. at 1014.

drawing or impanelling of the grand jury", rather it applies to all defenses and objections "based on defects in the institution of the prosecution", a term much broader than former Section 556(a). Second, the defect here is not that a properly organized grand jury handed up an indictment beyond the scope of the order authorizing it to sit; rather it is that the grand jury was organized pursuant to an order of a district court which did not have the power to authorize it to sit for the additional period of time during which the grand jury handed up the indictment at issue. In substance, the defendant's claim here involves nothing more than the allegation that the grand jury was illegally organized and, therefore, had no power to hand up valid indictments. This defect was plainly intended to be covered by Rule 12(b)(1), as the Advisory Committee notes made clear.[5]

Moreover, *United States* v. *McKay* did not deal with a plea of guilty. Accordingly, it is submitted, it cannot be viewed as dispositive of the issue here. On the contrary, we submit that the plea of guilty is itself sufficient to waive the defect here alleged. The basic principle upon which we rely was only recently reaffirmed in *Lefkowitz* v. *Newsome*, — U.S. —, 95 S.Ct. 886, 889 (1975). There the Supreme Court stated that:

> "The *Brady* trilogy announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings. This principle was reaffirmed in *Tollett* v. *Henderson*, *supra*, at 267: 'When a criminal defendant has solmenly admitted in open

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[5] In *Wax* v. *Motley*, 510 F.2d 318, 320 (C.A. 2 1975) a defect of the kind alleged here was characterized as being merely an "irregularity with respect to the grand jury". An "irregularity with respect to the grand jury" which returned an indictment is a defect "in the institution of the prosecution" within the plain language of Rule 12(b)(2).

> court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'"

The principle is plainly applicable here. See *Tollet* v. *Henderson*, 411 U.S. 258 (1973).

3. We recognize that the order permitting the defendant to withdraw his plea of guilty—albeit on the erroneous ground that the defect could not be waived—would, if not set aside, undermine our argument with respect to the effect of the plea of guilty. (It would not affect our argument on Rule 12 because Rule 12(b)(3) requires that a motion based upon a defect in the institution of the prosecution be made within "a reasonable time" after the initial plea (of not guilty) is entered, and here the motion to dismiss was made almost 16 months after the defendant pleaded guilty).[6]

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[6] See Wright, *Federal Practice and Procedure* (*Criminal*), Section 192, p. 402, where Professor Wright observes:

> Rule 12(b)(2) provides that certain defenses "may be raised only by motion before trial" and that "failure to present any such defense or objection as herein provided constitutes a waiver." This can certainly be read as meaning that no defense is waived if raised "before trial." The courts, however, have not so read it, and on close analysis it appears that the courts are right. The waiver comes from a failure to raise the defense "as herein provided" and the method provided therein is "by motion before trial." Rule 12(b)(3) then is operative and requires the motion before trial to be made before plea or "within a reasonable time thereafter." Thus cases holding a defense waived because not raised until an unreasonable time after the plea, though before trial, appear correct, and indeed the result is a desirable one with those defenses that are essentially of a dilatory nature.

That is one of the reasons, however, for our petition for a writ of mandamus directing the district court to set aside the order permitting the defendant to withdraw his plea of guilty. Our principal reason for seeking that relief, however, is because even if we are successful in reversing the dismissal of the indictment, without this additional relief, we will be left with an open indictment charging offenses which occurred almost seven years ago, and over two years since the defendant pleaded guilty. We do not believe that we should at this time be forced to go to trial on this indictment, particularly where the determination to permit the withdrawal of the guilty plea was not based upon an exercise of discretion, but upon an erroneous construction of law. We, therefore, proceed to show that under these circumstances the writ of mandamus should also issue.

POINT II

The District Court should be ordered to vacate the order permitting the withdrawal of the plea of guilty or to reconsider its ruling in light of the opinion herein.

Our discussion above stated the policy reasons for granting a writ of mandamus. We are, of course, aware that the Supreme Court has indicated that, while there is no jurisdictional bar to the issuance of the writ where a direct appeal has not been authorized, there are certain considerations of policy which militate against permitting the United States from obtaining review of an interlocutory order. These considerations were outlined in *Will* v. *United States*, 389 U.S. 90 at 96-97 (1967):

> " * * * All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court. See e.g., Judiciary Act of 1789,

> §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85; *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940); *McLish* v. *Roff*, 141 U.S. 661 (1891). This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him. *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). Moreover, 'in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored,' *Carroll* v. *United States*, 354 U.S. 394, 400 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. *Fong Foo* v. *United States*, 369 U.S. 141 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U.S.C. § 3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal, *Carroll* v. *United States*, 354 U.S. 394, 399-400 (1957). Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies."

We believe that the peculiar facts in this case, as well as the broad expansion of the categories of orders from which the United States may appeal, renders the reasoning in *Will* inapposite here. We observe, at the outset, that although the order permitting withdrawal of the guilty plea here may be characterized technically as interlocutory, the procedural posture in which this application for a writ of mandamus is presented, does not implicate any of the policy considerations invoked against appellate review of interlocutory orders; in fact, it is little different from other cases, where in reviewing the propriety of an order dismissing an indictment, an appellate court is in effect reviewing the correctness of an interlocutory order. See, e.g. *United States* v. *Tane*, 329 F.2d 848, 851-852 (C.A. 2, 1964).

Thus, in the instant case, the petition for the writ of mandamus has been coupled with an appeal from a final order dismissing the indictment, and raises an issue "inextricably interwoven" with the order permitting withdrawal of the guilty plea (*United States* v. *Tane*, *supra*, 329 F.2d at 851-852). Consideration of the instant petition, therefore, will not in any significant way deprive "the defendant * * * [of] a speedy resolution of the charges against him" (*Will* v. *United States*, *supra*, 389 U.S. at 96); nor, is there any danger that "the policies behind the double jeopardy prohibition" will be offended (Id.). For here we do not seek to subject the defendant to a second trial for the same offense, but to hold him to the plea of guilty which he knowingly and voluntarily entered. See *D'Allesandro* v. *United States*, —F.2d —, May 1, 1975 (C.A. 2) slip. op. 3401. The relief we seek no more offends the Double Jeopardy Clause than an order directing the district court to vacate an order setting aside a jury verdict of guilty. *United States* v. *Wilson*, — U.S. —; 95 S.Ct. 1013 (1975); *United States* v. *Weinstein*, 452 F.2d 704, 710, 712-713, (C.A. 2, 1971), *certiorari denied, sub nom. Grunberger* v. *United States*, 406 U.S. 917 (1972). Accordingly, the "policy reasons based on the defendant's rights under the Speedy Trial and Double Jeopardy provisions of the Constitution", which normally militate against issuance of writ in criminal cases (*United States* v. *Weinstein*, 511 F.2d 622, 626 (C.A. 2, 1975), are not implicated here.

Moreover, it must also be emphasized that much of what was said in the broad dictum in *Will* v. *United States*, *supra*, regarding appeals by the United States, no longer reflects current practice. Thus, whatever may have been the prevailing practice in 1967, when *Will* was decided, Congress has broadened considerably the class of cases in which appeals by the United States may be taken. The United States may now appeal from certain interlocutory orders (suppression motions), and its right to appeal other final orders has been broadened to the extent which the Constitution permits. Indeed, because the usual remedy for failure

to comply with a pretrial discovery order is suppression of the non-disclosed material or the dismissal of the indictment (F. R. Crim. P., Rule 16(g)), it is now not unusual for the United States to obtain review of discovery orders (of the kind at issue in *Will*) by appealing from the suppression order or the order of dismissal which follows non-compliance. See, e.g. *United States* v. *Percevault*, 490 F.2d 126 (C.A. 2, 1974). Further, Congress has now specifically directed that the Criminal Appeals Act be construed liberally (18 U.S.C. 3731). It is thus plain that appeals by the United States in criminal cases are neither "unusual" or "exceptional"; they are, in fact, commonplace.[7] And the more recent cases involving the use of the writ reflect the changes which have taken place since *Will* v. *United States* was decided.

Only recently, in *United States* v. *Carter*, 493 F.2d 704, 708 (C.A. 2, 1974), this Court granted a writ of mandamus to review "an interlocutory procedural order" which did not have the effect of a dismissal. While the determination to grant the writ in that case was based on the fact that the district court "did not simply abuse its discretion but usurped a power in making a finding which the Congress vested in the Attorney General", the modern view of the role of the extraordinary writ plainly justifies its use in other circumstances. As the Court of Appeals for the Fourth Circuit observed in *United States Board of Parole* v. *Merhige*, 487 F.2d 25, 29-30 (C.A. 4, 1973), *certiorari denied*, 417 U.S. 918 (1974):

> Recognizing as we do that the deposition and interrogatories authorized by the respondents were inappropriate in this case where the complaint rests

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[7] Last month, this Court (for the first time) set aside a judgment of acquittal entered by a district court judge and directed him to enter a judgment of conviction in accordance with the verdict of guilty returned by the jury. *United States* v. *De Garces*, No. 75-1013, (May 14, 1975). Such action was unheard of at the time *Will* was decided.

> upon such a tenuous jurisdictional basis, we feel that mandamus is appropriate. The traditional view that mandamus should be confined to instances of clear error going to the question of jurisdiction or power of the lower courts has been supplemented and expanded by the Supreme Court in its decisions in *Schlagenhauf* v. *Holder,* 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed. 2d 152 (1964), and *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). In *LaBuy* the Court affirmed the issuance of a writ of mandamus by the Seventh Circuit where "the supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration of the federal system". 352 U.S. at 259-260, 77 S.Ct. at 315. In *Schlagenhauf,* the Court approved the issuance of the writ to vacate an order of the district court which authorized the oppressive use of Rule 35 of the Federal Rules of Civil Procedure. We feel that the petitions of the Board in the present case fall within the rationale of both of these decisions.

A similar view of the appropriate use of the writ of mandamus was adopted in *United States* v. *Lasker*, 481 F.2d 229, 235-266 (C.A. 2, 1973), *certiorari denied,* 415 U.S. 975 (1974), where *Will* v. *United States, supra*, was distinguished on the ground that there the writ of mandamus was issued "without any written opinion stating the reasons therefore" (481 F.2d at 236).[8] See, also, *United States* v. *Weinstein, supra,* 511 F.2d at 626-627 (C.A. 2, 1975).

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[8] In *D'Allesandro* v. *United States,* — F.2d —, May 1, 1975 (C.A. 2), Slip op. 3401, this Court specifically left open the issue whether mandamus was available to set aside an order permitting the withdrawal of a plea of guilty.

Accordingly, we submit that there is no legal impediment, or consideration of policy, which should preclude the issuance of a writ of mandamus directing the district court to vacate its order permitting the defendant to withdraw his plea of guilty. We have asked, in the alternative, should there be some reluctance to issue the writ prior to giving the district court an opportunity to reconsider its decision in light of the holding on our direct appeal, that the district court judge simply be directed to reconsider his order assuming, of course, that we are correct in our submission that he erred in holding that the defect here at issue cannot be waived.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with directions to the district court to reinstate the indictment and vacate the order permitting the defendant to withdraw his plea of guilty.

Dated: June 9, 1975.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

APPENDIX

United States District Court

EASTERN DISTRICT OF NEW YORK

73 Cr. 497

THE UNITED STATES

vs.

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.

Docket Entries

Date	*Proceedings*
5/16/73	—Before Neaher, J—Indictment filed.
6/ 1/73	—Before MISHLER, CH. J.—Case called—Deft present with counsel—Deft MACKLIN arraigned and enters a plea of not guilty on behalf of all 3 defts—Aug. 6, 1973 for trial—Bail set at $10,000. personal bond with a $500.00 cash deposit by 6/15/73.
6/ 7/73	—By CATOGGIO, MAG.—Order for Acceptance of Cash Bail filed. (D. MACKLIN).
7/16/73	—Notice of Motion filed ret. 7-20-73 for Bill of Particulars, Inspections, etc.
7/20/73	—Before MISHLER, CH. J.—Case called—defts motion for Bill of Particulars withdrawn.

Docket Entries

Date	*Proceedings*
7/25/73	—Magistrate's file 73 M 803 inserted into CR file.
8/ 1/73	—Before, MISHLER, CH.J.—Case called—Deft Daniel Macklin and counsel present—Deft withdraws his plea of not guilty to cts 6 and 24 and after being advised of his rights by the court and on his own behalf enters a plea of guilty to cts 6 and 24—Sentence adjd without date—Bail condition contd.
10/ 5/73	—Before MISHLER, CH.J.—Case called—Sentence adjd without date. (DENNIS MACKLIN)
10/26/73	—Before MISHLER, CH.J.—Case called—Sentence adjd to 2/15/74 (D. MACKLIN)
2/22/74	—Before MISHLER, CH.J.—case called—sentence as to deft MACKLIN adjd to 4-19-74 on consent.
4/19/74	—Before MISHLER, CH J—case called—sentence adjd to June 7, 1974 on consent. (DANIEL MACKLIN)
4/25/74	—Letter dated 4-23-74 filed confirming that sentence adjd to June 7, 1974 received from Chambers re deft Macklin (from counsel Albert Socolov)
6/ 7/74	—Before MISHLER, CH.J.—Case called—Sentence adjd to Nov. 1, 1974 on consent letter to follow
11/ 1/74	—Before MISHLER, CH J—case called—sentence adjd to 12-6-74 on consent. (DANIEL MACKLIN)
12/10/74	—Notice of motion to withdraw plea of guilty and to dismiss indictment filed ret. 12/20/74

Docket Entries

Date	*Proceedings*
12/11/74	Letter from Albert Socolov, esq. to chambers dated 12/3/74 filed re: adjournment of case
12/20/74	Before MISHLER, CH.J.—Case called—Motion to dismiss argued—decision reserved
1/29/75	Letter filed dated Jan. 10, 1975 received from Chambers from E. Korman, Chief Asst. U.S. Attorney.
1/29/75	Defts Memorandum filed in support of motion to withdraw their plea of guilty etc and for dismissing the indictment (received from Chambers)
1/29/75	By MISHLER, CH J—Memorandum of Decision and Order filed; deft Machlin's motions to dismiss and to withdraw his plea are granted; the corporate defendants' motion to dismiss is denied.
2/10/75	Govts motion for rehearing or in the alternative for an order modifying the Order entered on Jan. 29, 1975.
2/21/75	Memorandum filed in opposition to motion for a rehearing (retd to Chambers)
3/27/75	By MISHLER, CH J—Memorandum of Decision and Order filed—court finding that the indictment is a nullity as to deft Daniel Macklin and is dismissed on court's own motion.

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 497

(T. 18 USC, § 1010, § 2 and § 371)

S-16-73

MISHLER, *J.*

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

The Grand Jury Charges:

COUNT ONE

On or about December 12, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act submitted to such Department for mortgage insurance for Fonnie Elliott, mortgagor, for a property at 119 Vernon Avenue, Brooklyn, New York, that said mortgagor was employed as a plasterer and

painter by Ralph Construction Company, 317 Ralph Avenue, Brooklyn, New York for a period of four (4) years when in fact the mortgagor was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWO

On or about December 10, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Employment submitted to said Department for Fonnie Elliott, mortgagor, for a property at 119 Vernon Avenue, Brooklyn, New York, that said mortgagor had been employed by Ralph Construction Company, 317 Ralph Avenue, Brooklyn, New York, as a plasterer and painter for a period of four (4) years when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT THREE

On or about November 24, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Deposit sub-

mitted to such Department for Fonnie Elliott, mortgagor, for a property at 119 Vernon Avenue, Brooklyn, New York, that said mortgagor had on deposit in Carver Federal Savings & Loan Association, 275 W. 125th Street, New York, New York, a balance of $600 when in fact he had no such amount on deposit with that institution as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT FOUR

On or about November 21, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Factual Data Credit Report prepared by Roy Clark Service Agency submitted to such Department for Fonnie Elliott, mortgagor, for a property at 119 Vernon Avenue, Brooklyn, New York, that said mortgagor had advanced $1,000 for the purchase of such property when in fact no such advance had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT FIVE

On or about November 1, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a repre-

sentation in a Contract of Sale submitted to such Department with an application for mortgage insurance for property at 119 Vernon Avenue, Brooklyn, New York, for Fonnie Elliott, mortgagor, that said mortgagor had made a cash deposit of $1,000 on the purchase of such property when in fact no such deposit had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT SIX

On or about May 23, 1969, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act submitted to such Department for John Walker, mortgagor for property at 42 Tompkins Avenue, Brooklyn, New York, that said mortgagor had made a $500 cash deposit on the purchase of such property when in fact no such deposit had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT SEVEN

On or about April 3, 1969, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in

a Dun & Bradstreet Credit Report submitted to such Department for John Walker, mortgagor, for property at 42 Tompkins Avenue, Brooklyn, New York, that said mortgagor had made a deposit of $500 on the purchase of such property when in fact no such deposit had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT EIGHT

On or about April 1, 1969, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Employment submitted to such Department for John Walker, mortgagor, for property at 42 Tompkins Avenue, Brooklyn, New York, that said mortgagor was employed by J. C. Harrison, 608 Sackman Street, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT NINE

On or about April 2, 1969, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for a Verification of Deposit made on the East

Brooklyn Savings Bank, Bedford Avenue and De Kalb Avenue, Brooklyn, New York submitted to such Department for John Walker, mortgagor, for a property at 42 Tompkins Avenue, Brooklyn, New York, that said mortgagor had a savings account balance of $700 when in fact he had no such account as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TEN

On or about March 21, 1969, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Contract of Sale submitted to such Department for John Walker, mortgagor, for property at 42 Tompkins Avenue, Brooklyn, New York, that said mortgagor had made a cash deposit of $500 on the purchase of such property when in fact no such deposit had been made as defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT ELEVEN

On or about November 14, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Mortgagee's Application for Mortgagor

Approval and Commitment for Mortgage Insurance Under the National Housing Act submitted to such Department for Waddell Elliott, mortgagor, for property at 26 Suydam Place, Brooklyn, New York, that said mortgagor was employed by Ralph Construction Corporation, 317 Ralph Avenue, Brooklyn, New York, when in fact he was not so employed as the defendant well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWELVE

On or about November 7, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Employment submitted to such Department for Waddell Elliott, mortgagor, for property at 26 Suydam Place, Brooklyn, New York, that said mortgagor was employed by Ralph Construction Company, 317 Ralph Avenue, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT THIRTEEN

On or about October 24, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false

statement, knowing the same to be false, namely a representation in a Request for Verification of Deposit submitted to such Department for Waddell Elliott, mortgagor, for a property at 26 Suydam Place, Brooklyn, New York, that said mortgagor had a savings account balance in the amount of $700 in Kings County Lafayette Trust, 5007 Church Avenue, Brooklyn, New York, when in fact he had no such account as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT FOURTEEN

On or about November 6, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Roy Clark Service Agency Credit Report submitted to such Department for Waddell Elliott, mortgagor, for a property at 26 Suydam Place, Brooklyn, New York, that said mortgagor had made a $1,000 cash advance on the purchase of such property when in fact no such advance had been made as defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT FIFTEEN

On or about October 21, 1968, within the Eastern District of New York, the defendant ADAM EQUITIES, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false

statement, knowing the same to be false, namely a representation in a Contract of Sale submitted to such Department for Waddell Elliott, mortgagor, for a property at 26 Suydam Place, Brooklyn, New York, that said mortgagor had made a cash deposit of $1,000 on the purchase of such property when in fact no such deposit had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT SIXTEEN

On or about June 3, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act submitted to such Department for Edgar Good, mortgagor, for a property at 604 Hancock Street, Brooklyn, New York, that said mortgagor was employed by Jimmy Jones Contracting, 345 Livonia Avenue, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT SEVENTEEN

On or about May 15, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement,

knowing the same to be false, namely a representation in a Dun & Bradstreet Credit Report submitted to such Department for Edgar Good, mortgagor, for property at 604 Hancock Street, Brooklyn, New York, that said mortgagor was employed by Jimmy Jones Construction Company, 345 Livonia Avenue, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT EIGHTEEN

On or about May 29, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Employment submitted to such Department for Edgar Good, mortgagor, for a property at 604 Hancock Street, Brooklyn, New York, that said mortgagor, was employed by Jimmy Jones Contracting, 345 Livonia Avenue, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT NINETEEN

On or about May 21, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in

a Request for Verification of Deposit submitted to such Department for Edgar Good, mortgagor, for property at 604 Hancock Street, Brooklyn, New York, that said mortgagor had a savings account balance of $900 in the Brownsville Credit Federation, P.O. Box 86, Brooklyn, New York, when in fact he had no such account as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY

On or about May 2, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published, a false statement, knowing the same to be false, namely a representation in a Contract of Sale submitted to such Department for Edgar Good, mortgagor, for a property at 604 Hancock Street, Brooklyn, New York, that said mortgagor had made a deposit of $600 on the purchase of said property when in fact no such deposit had been made as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY-ONE

On or about January 26, 1970, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered, and published a false statement, knowing the same to be false, namely a representation in a Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act submitted to such Department for James Fields,

mortgagor, for property at 594 Barbey Street, Brooklyn, New York, that said mortgagor was employed by A & D Tire Service, 1447 Gates Avenue, Brooklyn, New York, when in fact he was not so employed as the defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY-TWO

On or about November 25, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Request for Verification of Employment submitted to such Department for James Fields, mortgagor, for property at 594 Barbey Street, Brooklyn, New York, that said mortgagor was employed by A & D Tire Service, 1447 Gates Avenue, Brooklyn, New York, when in fact he was not so employed as defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY-THREE

On or about December 16, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Dun & Bradstreet Credit Report submitted to such Department for James Fields, mortgagor, for property at 594 Barbey Street, Brooklyn, New York, that said

mortgagor had made a cash deposit of $1,100 on the purchase of such property when in fact no such deposit had been made as defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY-FOUR

On or about November 13, 1969, within the Eastern District of New York, the defendant DANIEL MACKLIN, INC., a New York Corporation, and the defendant DANIEL MACKLIN, did for the purpose of influencing the action of the Department of Housing and Urban Development wilfully and knowingly make, pass, utter and publish, and cause to be made, passed, uttered and published a false statement, knowing the same to be false, namely a representation in a Contract of Sale submitted to such Department for James Fields, mortgagor, for property at 594 Barbey Street, Brooklyn, New York, that said mortgagor had made a cash deposit of $1,100 on the purchase of such property when in fact no such deposit had been made as defendants well knew. (Title 18, United States Code, § 1010 and § 2).

COUNT TWENTY-FIVE

From on or about October 21, 1968, and continuously thereafter up to on or about January 26, 1970, within the Eastern District of New York, the defendant DANIEL MACKLIN, did wilfully and knowingly, combine, conspire, confederate and agree together with Lawrence Moore and Samuel Goddard, named as co-conspirators but not as co-defendants herein (hereinafter collectively referred to as "Salesmen"), and with diverse other persons to the Grand Jury unknown, to commit offenses against the United States, that is to violate Section 1010, Title 18, United States Code, by systematically making, passing, uttering, and publishing false statements and forged instruments in connection with the obtaining of mortgage

insurance from the Department of Housing and Urban Development under the provisions of the National Housing Act for the purchase and sale of real estate through the defendant DANIEL MACKLIN, INC., and the defendant ADAM EQUITIES, INC.

It was a part of said conspiracy that the defendant DANIEL MACKLIN would regularly provide amounts of money to his Salesmen with instructions to open savings accounts in the names of prospective purchasers so that the assets for closing required by the Federal Housing Administration (FHA), an agency of the Department of Housing and Urban Development, might be reflected in the verifications of deposits requested by the mortgage company for submission to the FHA.

It was a further part of said conspiracy that the defendant DANIEL MACKLIN would require his Salesmen, at the time of opening the accounts in the names of prospective purchasers, to secure the signatures of those purchasers on withdrawal forms, and to retain the savings account pass books for the newly open accounts.

It was a further part of said conspiracy that, upon receipt of the verification of the deposit by the mortgagee, the defendant DANIEL MACKLIN would withdraw, or require his Salesmen to withdraw, most of the money from the purchasers accounts thereby reducing those accounts to a nominal amount.

It was further part of said conspiracy that the defendant DANIEL MACKLIN would regularly require his Salesmen to provide him with the names and addresses of persons who could be used to provide fictitious employment verification forms to be submitted with the application for mortgage insurance.

It was a further part of said conspiracy that the defendant DANIEL MACKLIN would regularly instruct his Salesmen to have prospective FHA mortgagors sign pur-

chase agreements, applications for mortgage insurance and other documents in blank so as to facilitate the imprinting of false information thereon on subsequent occasions.

It was a further part of said conspiracy that the defendant DANIEL MACKLIN would regularly require his Salesmen to sign bank verifications, employment verifications and other documents in names other than their own in order that the supporting documentation required by FHA could be submitted with the application for mortgage insurance.

It was a further part of said conspiracy that the defendant DANIEL MACKLIN would, from time to time, require his Salesmen to pose as the prospective purchasers at the closings for the purpose of signing proceeds checks and other documents necessary to effect the sale of the property.

It was a further part of said conspiracy that the defendant DANIEL MACKLIN would pay a fee to women who were unrelated to the purchaser, or to the person posing as the purchaser, to induce them to pose as the wife of the purchaser at the closings for the purpose of obtaining the necessary co-signatures on the documents required to consummate the sale.

OVERT ACTS

In furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants and co-conspirators engaged in a series of overt acts, which are set forth above in Counts One through Twenty-four and which are hereby incorporated herein by reference. (Title 18, United States Code, § 371).

A TRUE BILL.

.....

Foreman.

.....

United States Attorney

Notice of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 497

UNITED STATES OF AMERICA,

—VS.—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Albert H. Socolov, duly sworn to the 6th day of December, 1974, and upon the indictment and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the HONORABLE JACOB MISHLER, a District Judge, to whom this matter has been assigned for trial, on December 20, 1974 at 10:00 o'clock in the forenoon, for an order pursuant to Rule 32 of the Federal Rules of Criminal Procedure permitting the defendants to withdraw a plea of guilty heretofore made and for an order pursuant to Rules 12 and 34 of the Federal Rules of Criminal Procedure for an order dismissing the indictment upon the ground that the Court was without jurisdiction of the offense charged, together

with such other and further relief as to this Court may seem just and proper.

YOURS, etc.

ALBERT H. SOCOLOV
Attorney for Defendants
299 Broadway
New York, N.Y. 10007
(212) 267-1155

Dated: New York, New York
December 6, 1974

TO: HON. DAVID TRAGER
United States Attorney
Eastern District of N.Y.
Brooklyn, New York

CLERK, US DISTRICT COURT
Eastern District of N.Y.
Brooklyn, New York

Affidavit of Albert H. Socolov in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—vs.—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

State of New York,
County of New York, ss.:

ALBERT H. SOCOLOV, being duly sworn, deposes and says:

1. I am the attorney for the defendants, DANIEL MACKLIN, DANIEL MACKLIN, INC., and ADAM EQUITIES, INC., herein.

2. I make this affidavit in support of the defendants' motion pursuant to Rule 32 of the Federal Rules of Criminal Procedure permitting the defendants to withdraw their plea of guilty heretofore made and entered and further in support of the defendants' motion pursuant to Rules 12 and 34 of the Federal Rules of Criminal Procedure for an order dismissing the indictment dated May 16, 1973 and known and designated as criminal number 73 Cr. 497 upon the grounds that the Court was without jurisdiction of the offense charged by virtue of the fact that the Grand Jury which handed down said indictment had expired pursuant to Rule 6 of the Federal Rules of Criminal Procedure and that the life of said Grand Jury was extended beyond the time permitted by law and its action in indicting the defendants herein was therefore invalid.

Affidavit of Albert H. Socolov in Support of Motion

3. The defendants were indicted on May 16, 1973. Upon information and belief the Grand Jury which returned this indictment was the Grand Jury initially convened in the United States District Court for the Eastern District of New York on March 17, 1971.

Further, upon information and belief, the life of this Grand Jury was extended by MISHLER, *J.*, on or about August 30, 1972 for an additional six month period. The extension of the life of the Grand Jury followed an oral application by the Assistant United States Attorney and was made by the Court pursuant to United States Code Section 3331.

On February 2, 1973 the life was [sic] said Grand Jury was further extended by MISHLER, *J.*, to September 17, 1973 and was dissolved on that date.

4. A motion was made by defendant FEIN addressed to the validity of an indictment handed down by the same Grand Jury after the expiration of its original eighteen month term. This indictment was dismissed by DOOLING, *J.* 370 Fed supp 466 and the government appealed.

The United States Court of Appeals for the Second circuit per an opinion by MULLIGAN, *J.*, decided on October 15, 1974 unanimously affirmed the decision of Judge Dooling which held that the extensions granted under 18 USC Section 3331 were ineffective to prolong the life of the Grand Jury beyond its eighteen month statutory term and that the section relied upon applied only to Grand Juries involved in the investigation of organized crime and no others.

5. It is respectfully submitted that the decision in *United States* v. *Fein* is directly applicable to the case at

bar. Defendant MACKLIN individually and the two corporate defendants were indicted by the same Grand Jury beyond the date when its lawful right expired and was therefor invalid. Said Grand Jury was convened pursuant to Rule 6(g) which provides that "Grand Jury shall serve until discharged by the Court but no Grand Jury may serve more than eighteen months". Inasmuch as no indictment against the defendants in the case at bar was handed down within the lawful life of the Grand Jury, the Grand Jury no longer had authority to indict these defendants. The Court of Appeals concluded in *United States* v. *Fein* that the defect complained of goes to the very existence of the Grand Jury itself and was therefore not one which could be properly characterized as a merely formal or accidental defect. The Court held that such defect was therefore fatal to the indictment handed up by the Grand Jury which occurred after its term had expired.

6. The defendants herein pleaded guilty to two counts of the multiple count indictment prior to the decision in *United States* v. *Fein*. If this Court concludes that the decision in *United States* v. *Fein* is directly applicable to the case at bar then it would appear that the defendants in the instant case pleaded guilty to counts of an indictment which were in fact annulity and that the Court accepted pleas to counts of an indictment which were an annulity. It is respectfully submitted that if such indictment was in fact annulity, then the Court lacked the jurisdiction to accept the plea and the defendants were in fact pleading guilty to counts of an indictment which was itself annulity.

WHEREFORE, the defendants respectfully pray that they be permitted to withdraw the pleas of guilty heretofore entered upon the grounds that the Court was without jurisdiction of the offenses charged by virtue of the fact

that the Grand Jury which handed down said indictment was without jurisdiction to do so since its life and term had expired and that the indictment itself be dismissed upon the aforesaid grounds and upon the authority of *United States v. Fein.*

/s/ ALBERT H. SOCOLOV

.....

ALBERT H. SOCOLOV

Sworn to before me this
6th day of December, 1974.

IRVING MANDELL
Notary Public, State of New York
No. 41-7691324
Qualified in Queens County
Term Expires March 30, 1976

Memorandum of Decision and Order dated January 29, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73-CR-497

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

Defendants move, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, for an order dismissing the indictment against them. In addition, defendant Macklin moves to withdraw his plea of guilty to the indictment.

As a basis for both motions defendants assert that the court was without jurisdiction over the offense charged because the term of the grand jury which handed down the indictment had been improperly extended. In his decision in *United States* v. *Fein*, 370 F. Supp. 466 (E.D.N.Y. 1974), Judge Dooling determined that this same grand jury had been invalidly extended. Judge Dooling concluded that as a result of this fact, the indictments prepared by the grand jury were invalid. *Id.* at 468-69. In addition, he pointed out that this defect was not merely a technical irregularity which was waived by entry of a guilty plea. Instead, Judge Dooling found that this was an error "that goes to jurisdiction." *Id.* at 469. The Court of Appeals affirmed the *Fein* decision, 504 F.2d 1170 (2d Cir. 1974). *Cf. Wax* v. *Motley*, — F.2d — (2d Cir. Jan. 21, 1975, Docket No. 75-3003).

Memorandum of Decision and Order dated January 29, 1975

On the authority of *Fein* the defendant Daniel Macklin's plea is withdrawn and the indictment dismissed as against him. The government argues that although the improper extension made the grand jury's indictment invalid, this objection was waived by defendant's entry of a plea of guilty. In support of this position the government asserts that the language of Rule 12(b)(2) includes as objections which are waived by the entry of a plea irregularities such as the "illegal . . . organization" of the grand jury. In addition, the government points to two recent decisions of the Supreme court in which it was determined that entry of a guilty plea had the effect of waiving objections to the unconstitutional formation of the grand jury. *Davis* v. *United States,* 411 U.S. 233, 93 S.Ct. 1577 (1973); *Tollett* v. *Henderson,* 411 U.S. 258, 93 S.Ct. 1602 (1973).

However, the situation is different where, as here, the defect is one which renders the grand jury's actions void *ab initio.* Since the grand jury had no power to indict, the court had no jurisdiction over the defendant. Furthermore, a defect of this nature can be raised at any time in the proceedings; it cannot be waived.

Nor can the indictment be saved by the suggestion, advanced by the government, that Macklin's plea to the invalid indictment was in effect a plea to an information, since the United States Attorney signed the indictment which was brought by him and the grand jury. Because Macklin faced a term of imprisonment in excess of a year if convicted, the Fifth Amendment required that he be pro-

ceeded against by an indictment returned by a grand jury.[1] His plea of guilty to the indictment cannot be interpreted as a waiver of that constitutional right.

The situation is different, however, with respect to the corporate defendants. As to these defendants the indictment is effective as a charging instrument because the corporation could be proceeded against by an information. The corporate defendants, unlike defendant Macklin, are not subject to any term of imprisonment if convicted of the charges against them. Accordingly, the charges against them are not "infamous" within the meaning of the Fifth Amendment, (see n. 1 *supra*). The indictment, signed by the United States Attorney, indicating his agreement with the grand jury in the institution of a criminal proceeding, is effective as an information. *United States* v. *Wright*, 365 F.2d 135, 137 (7th Cir. 1966). Therefore the defect in the grand jury proceeding does not render the indictment invalid against the corporations. Instead, the indictment is proper as an information and the motion to dismiss the indictment is denied.

Defendant Macklin's motions to dismiss and to withdraw his plea are granted; the corporate defendants' motion to dismiss is denied and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

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[1] The Fifth Amendment provides in relevant part that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." An infamous crime has been defined as one which is punishable by imprisonment for a term exceeding one year. *E.g. Green* v. *United States*, 356 U.S. 165, 78 S.Ct. 632 (1958).

Memorandum of Decision and Order dated March 27, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 497

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.

Defendants.

The government's motion to reargue or modify the memorandum of decision and order dated January 29, 1975 is granted to the extent that a further ordering paragraph is hereby added to the last paragraph of the memorandum of decision as follows:

The court finding that the indictment filed is a nullity, the indictment as against the defendant, Daniel Macklin, is dismissed on the court's own motion, and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

★ U. S. Government Printing Office 1975— 614—251—110

AFFIDAVIT OF MAILING

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ERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

es and says that he is employed in the office of the United States Attorney for the Eastern
ct of New York.

t on the 9th day of June 19 75 he served ~~a copy~~ two copies of the within
Brief and Appendix for the Appellant

cing the same in a properly postpaid franked envelope addressed to:
Albert H. Socolov, Esq.
299 Broadway
New York, N. Y. 10007

eponent further says that he sealed the said envelope and placed the same in the mail chute
for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County
ngs, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

n to before me this
h day of June 19 75
Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977